



The Attorney General of Texas

May 12, 1983

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Mr. Larry D. Toomey
First Assistant City Attorney
City of Amarillo
P. O. Box 1971
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Open Records Decision No. 378

Re: Whether the Police Department of the city of Amarillo may withhold from public disclosure photographs of accident scenes in which drunk drivers have been involved

Dear Mr. Toomey:

The city of Amarillo chapter of Mothers Against Drunk Drivers (MADD) has asked the city police department for copies of photographs of the scenes of accidents involving drunk drivers. You advise that police department accident personnel take these photographs, which are used in investigating the accidents and in determining whether charges will be filed against anyone. As the assistant city attorney, you have asked us to decide whether the police department must comply with this request. You contend that sections 3(a)(1) and 3(a)(8) of the Open Records Act, article 6252-17a, V.T.C.S., except these photographs from required public disclosure.

Section 3(a)(1) excepts from mandatory public disclosure:

information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

Section 3(a)(8) excepts:

records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters relating to law enforcement.

Your claim under section 3(a)(1) is that the photographs are "protected by a common law privilege protecting an individual against possible defamation." You urge that the photographs may be withheld because they "often depict the kind and type of vehicle involved, license numbers, victims, and other evidence from which the identity of the parties involved could be determined."

There is no issue of "defamation" involved here. "Defamation" is the "offense of injuring a person's character, fame, or reputation by false and malicious statements." Black's Law Dictionary 505 (4th ed. 1968). We assume that your argument actually is that these photographs are protected from disclosure by the common law right of privacy. See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976).

You state that such photographs might provide information from which the identity of the parties involved could be determined and on this basis you indicate that a common law right of privacy prevents public disclosure of the photographs. The legislature has determined, however, that the identities of persons involved in an automobile accident shall be open to the public. See V.T.C.S. art. 670ld, §47; Open Records Decision No. 84 (1975). The legislature may enact statutes which abolish common law rules. V.T.C.S. art. 1; Fowler Commission Co. v. Charles Land & Co., 248 S.W. 314, 315 (Tex. 1923); In interest of B___ M___ N___, 570 S.W.2d 493, 502 (Tex. Civ. App. - Texarkana 1978, no writ). Thus, if the legislature has enacted a statute making certain information open to the public, that information cannot be said to be protected by a common law right of privacy.

Section 44(a) of article 670ld, V.T.C.S., requires that the driver of a vehicle involved in an accident resulting in injury to or death of any person, or property damage to the apparent extent of two hundred fifty dollars (\$250) shall forward a written report of the accident to the Department of Public Safety. Every law enforcement officer who investigates a motor vehicle accident subject to the reporting requirement of section 44(a) must also send a written report of the accident to the Department of Public Safety. V.T.C.S. art. 670ld, §44(c). The written reports to be made "shall call for sufficiently detailed information to disclose with reference to a traffic accident the cause, conditions then existing, and the persons and vehicle involved." Id. §45(a). Reports made by drivers are confidential, "except that the Department may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident. . . ." Id. §47. Accident reports submitted by peace officers after January 1, 1970, are public records open for public inspection. Id. See also Open Records Decision No. 84 (1975). Thus, the identity of all persons involved in an accident will be available to the public, and detailed information about the accident will be available from reports filed with the Department of Public Safety by law enforcement officers. Such information is not protected from public disclosure by a common law right of privacy.

Moreover, the reports reveal more information than the photographs would. It is unlikely that a still photograph of the accident scene would reveal whether the driver might have been intoxicated. Yet, the peace officer's report form includes a space to

show arrests and charges and the type of alcohol test administered. Thus, a member of the public could learn from this report whether a driver was suspected of having been intoxicated at the time of the accident. We do not believe your 3(a)(1) claim is tenable.

We now turn to section 3(a)(8). This office has consistently held that this section authorizes information to be withheld where its release would "unduly interfere with law enforcement and crime prevention." See, e.g., Attorney General Opinion MW-446 (1982); Open Records Decision Nos. 350, 341 (1982), quoting from Ex parte Pruitt, 551 S.W.2d 706, 710 (Tex. 1977). Essentially, you argue that the release of these photographs would lead to this result because it would significantly lessen their value as aids in investigating accidents and in determining whether charges should be filed against anyone. For the following reasons, this argument is valid with respect to some of the photographs.

Prior decisions and opinions of this office have distinguished between "open" and "closed" investigative files. See, e.g. Open Records Decision Nos. 339, 320 (1982); 252, 216 (1980); Attorney General Opinion MW-446 (1982). These opinions and decisions establish that the availability of the section 3(a)(8) exception is greatly restricted when an investigative file has been closed, i.e., because a conviction has been obtained or a decision has been reached that no prosecution will be initiated. In our opinion, this "open-closed" distinction is particularly appropriate in this instance.

Where an investigative file is open and no decision has been made as to whether charges should be filed against anyone, it should be readily apparent that the release of photographs used in making that decision could, and likely would, significantly hamper law enforcement efforts. The release of the photographs would also reduce the evidentiary value of the photographs if charges are later filed and the case proceeds to trial.

In Open Records Decision No. 287 (1981), this office held that information may be withheld under section 3(a)(8) where it is apparent from an examination of the information itself how and why its release would unduly interfere with law enforcement. In our opinion, it is apparent from an examination of these photographs how such undue interference would likely occur where an investigative file is open. We therefore conclude that photographs in an open investigative file may be withheld.

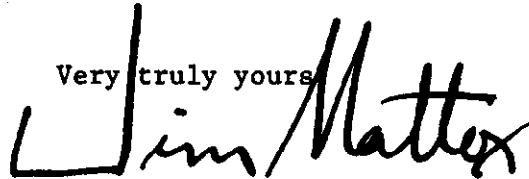
Where an investigative file is closed, however, we do not believe that the release of the photographs contained therein would, in each and every instance, unduly interfere with law enforcement. If a file is closed because a conviction has been obtained, for example, or because a decision has been made not to file any charges, it would be exceedingly difficult to make this argument. In instances such as these, the photographs will have served their intended purpose. They

will, in other words, no longer be used in investigating accidents and in determining whether any charges should be filed, because the closing of the file will mean that the investigation is over and that the decision as to whether to file charges already will have been made.

There may be legitimate reasons for withholding photographs even in a "closed file" situation. For this reason, we decline to conclude that all photographs in closed files must be automatically released. If you can successfully demonstrate how and why the release of particular photographs in particular closed files would unduly interfere with law enforcement, you may withhold those photographs. Otherwise, you must make them available.

To summarize: you may withhold photographs in open investigative files, and you may withhold photographs in closed files where you can demonstrate how and why their release would unduly interfere with law enforcement.

Very truly yours

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, slightly slanted style. The first letter "J" is large and loops around the "i". The "M" is also large and loops around the "a". The "t" is tall and loops around the "t". The "x" is written with two distinct strokes.

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